Supreme Court, U. S.
FILED
APR 5 1980
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1378

TOMAS ROSARIO, OVIDIO VEGA and RAY CABEL,
Petitioners,

v.

AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., ABE DOLGEN, Individually and as Manager of AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, ILGWU

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April 4, 1980

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (Motley, D.J.), filed November 14, 1977 is reported at 441 F. Supp. 657, and appears in the Appendix to the Petition at 47a. The District Court issued two clarifying amendments to its opinion, dated

January 11 and April 7, 1978, which are not reported, but which appear at 107a and 108a respectively.

The opinion of the United States Court of Appeals for the Second Circuit (Moore, Mansfield, C.JJ., Wyatt, D.J.), filed July 17, 1979, is reported at 605 F.2d 1228, and appears at 1a. The order of the Court of Appeals denying rehearing, filed November 20, 1979, appears at 123a. The order of the Court of Appeals denying rehearing *en banc,* also filed November 20, 1979, does not appear in the Appendix to the Petition.

Jurisdiction

This Court lacks jurisdiction because the petition is untimely.

Petitioners filed what would have been a timely petition for certiorari on February 19, 1980 (the "February 19 petition"). However, the Clerk of this Court rejected the February 19 petition, pursuant to Rule 39 of this Court, apparently because the copy of the District Court opinion it contained was illegible and printed in type smaller than 11-point (having been photostatically reproduced from Federal Supplement). Petitioners were permitted to file a superseding petition to correct that error, which they did, on March 7, 1980 (the "March 7 petition"). However, rather than simply correcting the printing error, the March 7 petition substantially revised the February 19 petition. The Statement of the Case is entirely new (different not only from the February 19 petition, but also from the facts found below). The Argument was revised on 15 of its 24 pages. And one of the Questions Presented (number 4)

was modified by a reference to an additional statute (29 U.S.C. § 529), which was also added to the Statutes Involved.

Because the March 7 petition presents new and different arguments, it should be docketed as of the date it was actually filed, rather than the date of the February 19 petition.* On that basis, the petition is untimely, and this Court does not have jurisdiction under 28 U.S.C. § 1254(1).

Questions Presented

The petition asks this Court to review the following questions:

1. Where respondent-union has the right, under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* ("LMRDA" or "Landrum-Griffin Act"), to suspend or expel petitioner-union members as a disciplinary sanction, may the union impose the lesser sanction of suspension of the right to attend membership meetings for a fixed period of time?

The Court of Appeals, reversing the District Court, held that the union may impose the lesser-included sanction.

2. Did a notice stating that respondent-union would conduct a "hearing *de novo*" on the appeal of charges against petitioners, union members, and that the members would be accorded the right to be represented by counsel, to present evidence, to examine and to cross-examine witnesses,

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* Had the March 7 petition merely corrected the printing error, it could have been docketed as of February 19, under Rule 39(4).

and to make opening and closing statements, give the members adequate notice that the hearing would be a new trial of the charges against them and not merely an appellate review of their previous trial?

The Court of Appeals, reversing the District Court, held that the union members were given "ample notice" of the nature of the proceeding.

3. Was the final union disciplinary hearing given to petitioners a "full and fair hearing"?

The District Court held that the hearing was: "full and fair hearing," and, indeed, "went beyond the requirements of current law." (75a). Petitioners did not contest that finding in the Court of Appeals. Thus, this question is not properly before this Court.

4. Are petitioners entitled to compensatory damages for violation of their procedural rights under the LMRDA, where they introduced no proof that they sustained any damages, and did not ask to be awarded nominal damages?

The Court of Appeals set aside the jury award of compensatory damages, holding that petitioners failed to prove that they sustained any damages.

5. Where a jury is instructed, without objection, that punitive damages may not be awarded in the absence of compensatory damages, and the compensatory damage award is set aside for lack of proof, may the punitive damage award be allowed to stand?

Having set aside the award of compensatory damages, the Court of Appeals also set aside the award of punitive damages.

• • •

These questions are not worthy of certiorari: the decisions below are clearly correct, and there are no conflicts among the Circuits.

Statute Involved

This case involves the following provisions of the LMRDA:

29 U.S.C. § 402(*o*):

> "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

29 U.S.C. § 411:

> *Bill of rights; constitution and bylaws of labor organizations*
>
> (a)(1) *Equal Rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(a)(2) *Freedom of speech and assembly.*—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

(a)(5) *Safeguards against improper disciplinary action.*—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) *Invalidity of constitution and bylaws.*—Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Statement of the Case

Petitioners are members of Respondent Amalgamated Ladies Garment Cutters' Union, Local 10, ILGWU ("Local 10") who have opposed the union's administration for several years. In this action, they charged that Local 10 and the ILGWU, its parent union, disciplined them in violation of the LMRDA. Petitioners' claims arose out of a

series of union disciplinary trials held on a charge, filed by respondent Abe Dolgen, the former manager of Local 10, that petitioners had disrupted union activities by conducting a "sit-in" in Dolgen's office on January 29, 1975 (4a).

Petitioners made two substantive claims against Local 10: that the charges brought against them were false, and that the charges were filed in retaliation for their criticism of Local 10's administration, and thus in violation of their protected "free speech" rights under the LMRDA (51a). One of the substantive claims was rejected by the District Court, and the other by the jury. Finding that there was "some evidence" that petitioners had disrupted union activities, the court granted summary judgment dismissing their claim that the union charges were false (100a-103a). And the jury explicitly found, as part of its special verdict, that petitioners had failed to prove that they were disciplined in retaliation for their exercise of protected rights, rather than because of their "sit-in" (Special Question No. 3, 118a). Petitioners did not appeal these determinations to the Court of Appeals.*

The issues raised in the Court of Appeals, and now before this Court,** arose solely from petitioners' claim that

* In their Statement of the Case, petitioners renew their claim that the union charges were "false" and infer that the union charges were intended to punish them for their dissident activities (7). That is an accurate characterization of the complaint but a wildly inaccurate statement of the facts found by the courts below.

** The Court of Appeals ruled in petitioners' favor on two additional issues, holding that petitioners had the right to tape-record their union disciplinary trials (19a-26a) and that retrial of union disciplinary charges may not be held before the same panel (26a-29a). Respondents do not regard those questions as being worthy of certiorari, and therefore did not cross-petition for certiorari on those issues.

Local 10 violated their *procedural* rights in the following respects:

The District Court held that the discipline imposed upon petitioners—suspension from the right to attend Local 10's quarterly membership meetings for 18 months for petitioners Rosario and Vega and for 12 months for Cabel—was not permitted by the LMRDA, even though the LMRDA gives unions the explicit right to suspend and even expel members as a disciplinary sanction (72a-74a). The Court of Appeals reversed, holding that the union was allowed to impose the lesser-included sanction (16a).

The District Court held that petitioners' final union disciplinary hearing was a "full and fair hearing"—and indeed "went beyond the requirements of current law" (75a)—in all respects except that the notice given to petitioners was inadequate (75a-76a), because it did not adequately inform them that the hearing would be a new trial, rather than merely an appellate review of the earlier trial (77a-79a). The Court of Appeals reversed, holding that the notice was "ample" (30a). The Court of Appeals was not asked to, and did not, review the District Court holding that—in all other respects—the final union disciplinary trial was a "full and fair hearing."

The jury awarded each of the three plaintiffs $1,000 in compensatory damages and $10,000 in punitive damages against Local 10 (121a-122a). The Court of Appeals set aside the compensatory damage award for lack of proof (32a-33a). The Court of Appeals also set aside the punitive damage award, noting that petitioners did not except to the District Court instruction that "punitive damages cannot be awarded in the absence of compensatory damages" (33a).

Reasons for Denying the Writ

The petition for certiorari should be denied because the Second Circuit's decision is clearly correct, there are no conflicts between the Circuits, and the questions presented are insubstantial and not worthy of certiorari.

A. The punishment imposed upon petitioners—suspension from the right to attend membership meetings for a fixed period of time—is permitted by the LMRDA.

Because the District Court rejected petitioners' claims that the union charges were false, and because petitioners failed to prove that they were disciplined in retaliation for their exercise of protected rights, there is no question that, after a "full and fair hearing," the union could have suspended or expelled petitioners from membership—as explicitly authorized by the LMRDA, 29 U.S.C. § 411(a)(5).

Even so, petitioners claim that the union may not impose the lesser sanction of suspension of the right to attend membership meetings. The only support which they offer for that position is a tortured construction of the LMRDA: that a disciplined union member remains a "member," as defined in 29 U.S.C.A. § 402(*o*), and accordingly, must enjoy the rights guaranteed by Section 411(a) to "[e]very member of a labor organization," including the right "to attend membership meetings." 29 U.S.C. § 411(a)(1).

The Court of Appeals correctly held that this literalistic construction defies both the statute and common sense. The LMRDA "does not restrict the form of discipline a union

may impose" (16a). Moreover, "common sense dictates that a union should have the option of imposing a sanction less drastic than complete suspension when a member disrupts the conduct of union meetings or business." (18a). The Court of Appeals concluded,

> "The suspension of a union member's right to attend meetings cannot imperil union democracy or oppress the union member when the union would be entitled to suspend the member from membership altogether." (18a).

The two other Circuits which have expressly considered this issue are in agreement with the decision below. In *Reyes* v. *Laborers' Int'l Union,* 464 F.2d 595, 597 (10th Cir. 1972), *cert. denied,* 411 U.S. 915 (1973), the Tenth Circuit held that suspension of the right to attend union meetings for three years was proper discipline "expressly recognized in 29 U.S.C. § 411(a)(5)." And in *Airline Maintenance Lodge 702* v. *Loudermilk,* 444 F.2d 719, 723 (5th Cir. 1971), the Fifth Circuit held that, where a union member seeks to support a rival union, the union may not fine him, but it may "choose to expel him or to bar him from meetings and the like."

Petitioners argue that the decision below is in conflict with the Ninth Circuit's decision in *Stachan* v. *Weber,* 535 F.2d 1202 (9th Cir. 1976). The Second Circuit succinctly disposed of the alleged conflict:

> "*Stachan* v. *Weber,* 535 F.2d 1202 (9th Cir. 1976), cited by the district court and relied upon by appellees [petitioners], is of no help. There the court simply ruled that union members who had refused to salute the flag and recite the pledge of allegiance at the open-

> ing of union meetings could not be excluded, since their conduct was protected under the free speech clause of § 101, 29 US.C. § 411(a)(2). Although the court's statement that the 'exclusion would clearly violate the equal rights section of the Act,' 535 F.2d at 1203, might conceivably be interpreted as prohibiting such a form of discipline, the more plausible interpretation is that the union could not exclude members from union meetings without first conducting a 'full and fair' hearing on written charges brought under the union's constitution or by-laws." (15a-16a).

B. The notice of petitioners' final union trial was adequate.

The Second Circuit's decision of the second question raised by the petition—whether the notice of petitioners' final union hearing adequately informed them that the proceeding would be a trial and not merely an appellate review —looked to the substance of that notice and found that:

- Petitioners received the notice well in advance of the hearing date (30a).
- The notice told petitioners that the union would conduct a "hearing *de novo*" (30a).
- The notice told petitioners that they could be present and represented by counsel (30a).
- The notice told petitioners that they could present documentary and testimonial evidence (30a).
- The notice told petitioners that they could examine and cross-examine witnesses (30a).
- The notice told petitioners that they could make opening and closing statements (30a).

The Court of Appeals thus concluded that, although the notice described the proceeding as a "hearing *de novo* on appeal,"

> "the substance of the message was clear: appellees [petitioners] were being offered a trial with all of the due process rights previously denied." (30a).

Petitioners do not cite a single case, decided by this Court or any other federal court, in conflict with this decision.

Not only is the decision correct, but the question presented is hardly appropriate for this Court's consideration: a decision on the adequacy of this particular notice, issued by the union after a tortuous chain of events, including three prior union trials, would necessarily hinge on the peculiar factual context of this case, and could be of little precedential value.

C. The issue of whether petitioners' final union trial was a "full and fair hearing" was not raised in the Court of Appeals, and is not properly before this Court.

In addition to arguing that the notice of the final union trial was inadequate, petitioners claim that the trial itself was not a "full and fair hearing" (24-28). That issue was not raised in the Court of Appeals and therefore is not properly before this Court. *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1971).

When the fairness of the final union trial was raised in the District Court, the court held that the union

> "went beyond the requirements of current law in seeking to ensure that plaintiffs received a fair hearing attended by extensive substantive and procedural safeguards" (75a).

The District Court further held that the *sole* defect was the inadequate notice (75a). That was the only issue raised in the Court of Appeals; petitioner-union members did not ask the Court of Appeals to review the District Court's decision that the hearing itself was fair.* Thus, that issue may not be raised here.

D. Petitioners were not entitled to damages in the absence of any proof of damages.

Finally, petitioners argue that the Court of Appeals erred in vacating the awards of compensatory and punitive damages.

The compensatory damage award was set aside for the simple reason that petitioners did not introduce *any* evidence that their "mental anguish"—the only damage claimed—was caused by respondents' wrongdoing. This is consistent with the well-settled principle that damages may not be given for any injury unless there is *some* proof that the injury was *directly caused* by the violation of law found by the court. *Yanity* v. *Benware,* 376 F.2d 197, 200 (2d Cir.), *cert. denied,* 389 U.S. 874 (1967) (rejecting a claim for damages under the LMRDA, because "The connection between defendant's alleged wrongful act and the injury to

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* Petitioners improperly suggest, in their Questions Presented (3) and Argument (24) that the Court of Appeals stated that the final union trial was "hardly conducive to impartial resolution of the issues" and presented "the obvious danger that [the decision-makers] will not be fair and impartial" (3, 24). The Court of Appeals made these statements about the fact that the second union trial was held before the same panel that heard the first union trial. The Court of Appeals did not make these—or any other—statements about the final union trial, because the fairness of that trial was not raised in that Court.

plaintiffs is . . . too speculative and too remote as a matter of law to permit an award of damages.'')*

Petitioners claim that the decision below is in conflict with the Ninth Circuit's decision in *Addison* v. *Grand Lodge of the Int'l Ass'n of Machinists,* 318 F.2d 504, 508 (1963). However, *Addison* merely held that a member's wrongful discipline may give rise to a cause of action for damages. It did not hold that the member was entitled to damages in the absence of proof that he sustained damages.**

The Second Circuit also properly vacated the punitive damage award, stating

> ''Nor did appellees [petitioners] except to Judge Motley's instruction that punitive damages cannot be awarded in the absence of compensatory damages'' (33a).

Petitioners suggest that this is a ''radically new'' construction of Rule 51 of the Federal Rules of Civil Procedure. It is not. It is instead the language of the rule:

> ''No party may assign as error the giving or the failure to give an instruction unless he objects thereto before

* In *Carey* v. *Piphus,* 435 U.S. 247, 264 (1978), this Court applied the same rule to civil rights actions under 42 U.S.C. § 1983:

> "although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."

** Had the Court of Appeals not vacated the damage award in its entirety, it would have been necessary to remand for a new trial because the award was based, in part, on the District Court's finding that the union had imposed an improper punishment (suspension of the right to attend union meetings)—a finding later reversed by the Court of Appeals.

> the jury retires to consider its verdict . . . .'' Rule 51, *Fed. R. Civ. P.*

Instructions to which there are no objections thus become the law of the case; they may not be re-examined unless there was ''plain error'' or a ''substantial miscarriage of justice''—neither of which occurred here. *Cohen* v. *Franchard Corp.,* 478 F.2d 115, 124 (2d Cir.), *cert. denied,* 414 U.S. 857 (1973).

Moreover, if this Court were to grant certiorari on this issue, it would have to address the two legal assumptions on which the jury instruction was based: whether punitive damages may be awarded in the absence of compensatory damages, and whether punitive damages may be awarded, at all, under the LMRDA in light of this Court's decision in *Int'l Brotherhood of Electrical Workers* v. *Foust,* —— U.S. ——, 99 S. Ct. 2121 (1979), that such damages may not be awarded against a union in fair representation cases under the National Labor Relations Act.* Those issues—which were not briefed or argued below—should not be considered, for the first time, in this Court.

* In *Foust,* this Court specifically stated that it was "express[ing] no view on the propriety of punitive awards under the Landrum-Griffin Act." —— U.S. at ——, n.9, 99 S. Ct. at 2125, n.9.

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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